No. 697

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, et al.,

Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, Intervenor, and

ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, *et al.*,

Petitioners,

vs.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Oscar L. Grant, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on December 8, 1955 in the above entitled cause (Nos. 12,478 and 12,498 below).

Opinions Below

The opinion of the United States District Court for the District of Columbia is printed in Vol. I Jt. App. 175, and is unreported; the Supplemental opinion of said court is printed in Vol. I Jt. App. 219, and is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in the Appendix hereto, p. 26, and is unreported.

Jurisdiction

The judgment of the United States Court of Appeals f the District of Columbia Circuit was entered December 1955. The jurisdiction of this Court is invoked und Title 28, United States Code, Section 1254.

Questions Presented

The Agricultural Marketing Agreement Act of 19 authorizes the Secretary of Agriculture to issue orders re ulating the handling of milk, which shall contain one more of the terms and conditions specified in Section 8c(including payment to producers and associations of pr ducers of uniform prices for their milk, subject only specified adjustments, and, except as provided in subs tion (7), no others. Subsection (7) (D) authorizes all su orders to contain terms and conditions "incidental to, a not inconsistent with, the terms and conditions specifi in subsections (5), (6), and (7) and necessary to effectu the other provisions of such order." The questions pr sented are:

1. Does said Subsection (7)(D) authorize the Secreta to require that a portion of the amounts paid by handle (i.e., purchasers) as the price for milk delivered to the by producers (including non-members of cooperative ass ciations) shall be deducted from such amounts and ther upon paid, not to all producers of such milk, but to certa cooperative associations (or federations thereof), as pr vided in Sec. 927.76 of Order No. 27 regulating the ha dling of milk in the New York area?

2. Does any other provision of the Act authorize t Secretary to require that any portion of the amounts pa by handlers as the price for milk delivered to them by pr ducers (including non-members of cooperative association shall be deducted from such amounts and thereupon pai not to all producers of such milk, but to certain cooperati associations (or federations thereof), as provided in S 927.76 of Order No. 27?

Statute and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 601 et seq. Provisions essential to this case are set forth in the Appendix hereto, p. 1.

The administrative order involved herein is Order No. 27, regulating the handling of milk in the New York Metropolitan Marketing Area, issued by the Secretary of Agriculture of the United States [7 C. F. R. Sec. 927.1 *et seq.* (1952), as amended, 7 C. F. R. Sec. 927.76 (Supp. 1955)]. The particular provisions directly involved in this case are set forth as follows: The pertinent provisions of the 1938 Order appear in the Appendix hereto, p. 7; the 1953 Amendment appears in the said Appendix at p. 12.

Statement of the Case

The petitioners are dairy farmers or milk producers, who, immediately after the decision of this Court in *Brannan* v. *Stark*, 342 U. S. 451, in March 1952, instituted this class action to enjoin the Secretary of Agriculture from enforcing certain provisions of Order No. 27, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, very similar to the provisions of the Boston Order No. 4 invalidated in that case. Under the challenged provisions, deductions are made from petitioners' milk prices, and the sums so deducted monthly are thereupon paid out to certain cooperative associations of producers. In the year (1951) prior to commencement of this action, $1,273,109 had been paid out to about 73 cooperatives,* of which sum over $400,000 was deducted

*Larger sums are now (under the 1953 Amendment) prescribed for payment instead to only 2 cooperatives and 2 federations. See note 7 below, p. 10.

from the price of milk produced by approximately 17,500 individual producers who are not members of qualified cooperatives. The petitioners and others similarly situated are not members of such cooperatives, and therefore complain of such deductions and payments.

The challenged provisions of Order No. 27 became effective September 1938. These provisions, with minor amendments, remained substantially the same until December 16, 1953. The 1938 provisions (Appendix, p. 10) authorized deductions from producer prices, for payments to cooperatives sought by them for their customary activities in selling milk subject to the regulatory program, including presenting testimony at hearings and certain activities claimed to be related to milk utilization. The latter activities had been chiefly relied upon by the Secretary in support of the provisions of the Boston order held invalid in the *Stark* case.

In 1953 the Secretary held a hearing, as a result of which the 1938 provision for payments was deleted and superseded by an amendment effective December 16, 1953 (Appendix, p. 12). The 1953 Amendment adopted six conditions under which cooperatives are paid for customary activities in connection with the regulatory program, such as participating in hearings, studying marketing problems and conducting an educational program respecting the milk order.

The District Court for the District of Columbia granted a preliminary injunction April 7, 1952, under which the challenged deductions were continued and paid out to cooperatives, except that (generally stated) sufficient monies were held in escrow to protect petitioners and other nonmembers. The equity jurisdiction of the District Court was invoked under the Act of June 25, 1948, c. 646, 62 Stat. 931; 28 U. S. C. Sec. 1337. The complaint and supplemental complaint was tried on February 24, 1954, before District

Judge Casper Platt, who filed his opinion on July 8, 1954, denying the injunction and dismissing the action; on September 23, 1954, he issued his final judgment to that effect, and also ordered a partial stay with respect to operation of both the 1938 and 1953 provisions, pending appeal.

The case, No. 12,478, was argued upon appeal (and cross-appeal, No. 12,498, with respect to the stay) in the Court of Appeals for the District of Columbia Circuit, on May 5, 1955, before a panel of that court entirely different from that which decided *Brannan* v. *Stark*, 185 F. (2d) 871, affirmed 342 U. S. 451. On December 8, 1955, the court below affirmed the judgment and vacated the partial stay, Circuit Judge E. Barrett Prettyman dissenting. On January 10, 1956, the court below entered an order staying the mandate and continuing in effect such partial stay (under which over $2,500,000 has accrued in escrow since the inception of this action in 1952, drawing interest) until and including February 6, 1956, pending the filing of this petition. On February 2, a further stay was ordered to and including February 16, 1956 (Appendix, p. 41).

REASONS FOR GRANTING THE WRIT

I. The decision of the court below conflicts with applicable decisions of this Court.

The decision of the court below is in direct conflict with *Brannan, et al.* v. *Stark, et al.*, 342 U. S. 451.

The facts in this case and the *Stark* case are virtually the same. Both are actions in which milk producers, not members of cooperative associations receiving the challenged payments, filed similar injunction complaints to contest the authority of the Secretary to include certain provisions in milk marketing orders. Both cases are identical with respect to the cooperative activities or services ad-

vanced in support of the challenged payments; and are very similar, with respect to the order provisions describing the activities for which cooperatives qualify to receive the challenged payments.

In his dissenting opinion filed in the court below, Circuit Judge Prettyman stated that "it seems clear to me that the Supreme Court [in *Stark*] held the same conditions present in our case, or certainly very similar conditions, not to justify deductions to the cooperatives." In the *Stark* case, this Court found the provisions of the New York order (here challenged) to be "of the general nature of those in question" there (Footnote 19, at 466), and "providing for comparable payments" (Footnote 12, at 461).

The holding of this Court in *Stark* is directly contrary to the holding below. In *Stark*, this Court held that identical deductions, and the payments thereof to cooperatives under similar conditions, "are not 'incidental' to the specified terms" of the Act * * * and that they "are inconsistent therewith" (463); and, therefore, that the Court "need not determine whether they are 'necessary'" * * * (464). Accordingly, this Court held that the challenged provisions are not authorized by the auxiliary powers clause of the Act, Sec. 8c (7)(D). In direct conflict, the court below held that the terms challenged herein are "incidental to, not inconsistent with, and necessary * * *"; Appendix, p. 33.

After the pertinent provisions of the Boston order were analyzed, in the light of the statutory language this Court concluded in the *Stark* case, at 466: "We hold that they are not authorized by the Act." Section 8c(5) of the Act enumerates with particularity the terms and conditions that may be included in milk orders and limits such orders to those terms and, except as provided in Subsection (7), "no others". In considering this section, this Court held (462) "that Section 8c(5) does not authorize the provisions challenged here." Subsection (7)(D) permits pro-

visions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6) and (7) and necessary to effectuate the other provisions of such Order." This is the subsection principally relied upon by the Secretary in the *Stark* case, and by the court below in the instant case. In *Stark*, this was termed an "omnibus subsection" permitting only "auxiliary provisions" (462). In answer to the Secretary's claim that the cooperative payment provisions were of such basic importance to the milk market program, this Court said (463): "We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tailpipe." But this is exactly what the decision of the court below does.

The conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture under the Act of 1937 depends upon the intent of Congress as expressed in said Act, or whether it depends upon the views of the Secretary as to the desirability of his action. In *Stark*, this Court searched for and determined that which "Congress intended", using this or a similar phrase no less than five times (at 463, 465, 466). But the court below made no such search or determination, relying *exclusively* on the Secretary's findings, including the finding that his action was "reasonably necessary to accomplish the purposes of the statute through the method adopted" (Appendix, p. 34). In its basic concept that by reason of the Secretary's findings the Congressional intent need not be ascertained, the decision below is in direct conflict with *Stark* (and other decisions of this Court, noted below). This is the more clear since the decision in *Stark* was based not upon any lack of agency findings there, but solely upon the absence of statutory authority.

The majority opinion below, although stating that "there is some language in *Stark* which might seem opposed to our decision", attempted to distinguish that case on grounds which only serve to sharpen the conflict therewith:

1. The court below stated that the qualifying conditions in the Boston Order "showed on their face that the services to be performed by the cooperatives were designed to aid only their members" (Appendix, p. 34). The one clause of the 1953 Amendment herein [Condition (5)[1] of Sec. 927.76 (e)] which was used as an "example" by the court below does show on its face that it appears designed to aid both members and non-members by keeping them informed. However, the Boston Order also contained a requirement[2] which was urged as indicating benefits to non-members, i.e., activities incident to the operation of the uniform pricing program; and it was there urged that cooperative activities kept non-members informed of the program. But such requirement of the Boston Order was disposed of by this Court in the *Stark* case, where it was held that "even if this requirement comprehends a service to non-member producers substantial enough to be significant" (at 460), such activities generally "amount to no more than playing the part of an alert, intelligent, organized participant in the market * * * and maintaining the cooperative organizations by promotional work to show

[1] Condition (5) is only in the 1953 Amendments; Appendix, p. 20; quoted in text of opinion below, Appendix, pp. 35-36.

[2] This requirement, Condition (7) in Boston Order No. 4 stated: "(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers." Services which shaped and interpreted "to producers" the operation of the uniform pricing plan in Boston included the following, described by the Secretary in *Stark* (Secretary's Brief in Court of Appeals, p. 22): "Educational meetings are held at which non-members, as well as members, may attend. Radio programs are regularly maintained by some of the co-operatives and in this manner non-members, as well as members, are kept informed as to current market conditions. Some co-operatives publish and issue to their members periodicals which, while circulation is mainly among members of these co-operatives, frequently contain articles urging and assisting producers to market milk so that their collective efforts will benefit all interests in the market." There is no finding, and no suggestion, that under the New York order cooperative publications are not subscribed to mainly by members.

farmers the benefits of cooperation and by educational work among members" (462).

The other five requirements [3] of the 1953 Amendment do not, in any instance, show that they refer to any services to be performed for non-members. In this regard, they are exactly the same as the first six conditions [4] in the Boston order involved in *Stark,* wherein this Court held (at 459): "But none of these shows any indication that the activity it prescribes will benefit non-members * * *."

As for the 1938 provision, only one of the four qualifications for payment refers on its face to "all producers"; Appendix, p. 10. Here again, as in *Stark,* most qualifications do not recite any services to be performed for non-members.

2. The court below stated (Appendix, p. 36) that "the Supreme Court did not have before it in the *Stark* case detailed findings of the Secretary and the District Court to the effect that the services performed by cooperatives are marketwide and are of great benefit to non-members as well as members." However, *Stark* cannot be thus differentiated, for the following reasons:

(a) In connection with the 1938 provision of Order No. 27 the Secretary made no findings whatever, except that he merely adopted the statutory phrase applicable generally to the order, that it "will tend to effectuate the declared policy of the Act"; original 1938 provision, Vol. II Jt. App. 683, 3 F. R. 1945, as amended in 1940, Vol. II Jt. App. 689; and as amended in 1941, Vol. III Jt. App. 1244. See the statutory phrasing of Sec. 8c(4) and Sec. 8c(18); Appendix, pp. 1 and 5.

The court below erroneously treated, and permitted the Secretary to apply, his findings of August 17, 1953 (Vol. I

[3] Sec. 927.76(e) of 1953 Amendment, Appendix, p. 19; quoted in opinion below, Appendix, p. 36 (note 9).

[4] Quoted in opinion below, Appendix, p. 34 (note 8).

Jt. App. 107; 18 F. R. 4998) retroactively to 1938.[5] This, notwithstanding that these 1953 findings were used as the basis for deleting[6] and superseding this very (1938) provision, and for adoption of the 1953 Amendment, effective December 16, 1953, with much different provisions.[7] The 1938 order, during virtually its entire existence, was without supporting findings.

(b) The Secretary's findings that activities of cooperatives were "marketwide" services of "benefit to non-members", made in support of the 1953 Amendment in this case, do not distinguish this case from the *Stark* case. There also, the Supreme Court said that "it may be conceded that these activities are indirectly beneficial to the whole market" (342 U. S. at 460); "they may sometimes incidentally benefit the whole market" (at 462); the services are "incidentally helpful to other producers" (at 464). Thus, the *Stark* case did not turn on any lack of findings, on the facts deemed so critical below; rather, notwithstanding these very facts this Court found a lack of statutory authority for provisions such as in issue here. Nothing in the findings of the Secretary, or in the courts below, establishes that

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[5] Sec. 927.0 of the 1953 Amendment purports to remedy the defect by applying the 1953 findings back to "the issuance of the aforesaid order and each of the previously issued amendments thereto"; Appendix hereto, p. 12.

[6] The Official Committee of Experts, appointed by the Department, presented its report at the 1953 hearing and strongly urged deletion of the 1938 provision as "impractical and ineffective", Vol. V, Jt. App. 2173, 2175, and "not an appropriate means" of directing milk utilization, etc. (id., 2216). Accordingly, the Secretary found (Vol. I, Jt. App. 116, lines 3 to 10) that it caused "difficulty" and "unnecessary costs" * * * "without actually achieving a higher net utilization * * *."

[7] Essential differences are (1) listing certain "order and education" activities, Sec. 927.76(e), and eliminating the supposed surplus disposal or milk utilization activity, as conditions qualifying for payments; (2) reduction of qualifying cooperatives from 70-odd to only the 2 with over 4,000 members; (3) permitting the 2 federations of cooperatives to qualify.

the benefit to non-members herein is other than indirect and incidental to the normal and customary activity of efficient cooperatives in general, engaged in servicing their own members and promoting their own interests, at member expense, in all major milk markets (whether or not under regulation).[8]

(c) The Boston order, like the 1953 provision herein, did have supporting findings as to "necessity": 6 F. R. 3762, supplemented shortly thereafter in 1943, 9 F. R. 3057, 3059, by more detailed findings that cooperatives present "evidence at hearings concerning the needs of producers" and "constructive amendments", and assume "responsibility for a reserve of milk * * * essential in a market" * * * "considered necessary" * * * etc. Except that the Secretary's 1953 findings on the New York order are laden with argument and evidence, they rest upon the same marketwide nature and "necessity" as the findings made under the Boston order. This is another respect in which the facts of the two cases are indistinguishable.

3. The court below stated (Appendix, p. 37) "particular note must be taken of the difference between the Boston Order and the New York Order regarding the services to be performed by cooperatives in securing outlets for surplus milk and in disposing of milk so as to bring the highest net return to the fund." However, in *Stark*, this Court disposed of such services in Boston (there chiefly relied on as justifying the payment) on three grounds (at 460-461): (1) that such activities are merely "indirectly beneficial to the whole market"; (2) that "proprietary handlers also carry on activities of this kind"; (3) that "the associations are in no way required to handle any of the surplus milk

[8] The Official Committee of Experts listed 25 markets as typical of such customary cooperative activity (Vol. V, Jt. App. 2167-68). The Secretary found that activities herein commenced in New York in 1916 (Vol. I, Jt. App. 112), as more fully developed by said Committee in Vol. V, Jt. App. 2141-44.

of non-members." All three grounds[9] are present in t instant case (under both the 1938 and the 1953 provision but the court below disregarded them.

It was only as a fourth ground, pertaining to its conc sion that milk disposal activities did not support the co tested Boston payments, that the text of this Court's opi on pointed out "there is no requirement in the Order * * even with respect to surplus milk of their members." Fo note 12 of *Stark* thereupon contrasted certain language[10]

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[9] As for the first ground, it is undisputed here that in New Yo Boston and elsewhere cooperatives acquired such plants "mainly strengthen their bargaining position" (Official Committee of Expe Vol. V, Jt. App. 2142). As for the second ground, the Secret here found that "similar plants * * * are operated by proprieta handlers", although adding the immaterial (shown below, p. note 12) allegation that some cooperatives do so at a "greater fin cial burden" (Vol. I, Jt. App. 115); and said Committee conclu as to "this type of service" that "proprietary handlers * * * perfo it" (Vol. V, Jt. App. 2216). As for the third ground, see note below, p. 12, respecting 1938 provision; and note 12, p. 14, respect 1953 Amendment.

[10] Unfortunately, Footnote 12 did not quote the full language the 1938 New York Order. Had it done so, the word "mu [arrange for and supply, etc.] would not have been used there adopted below. The actual language of the 1938 provision originally limited to "best efforts", amended in 1941 to read "co mensurate with the marketing capacity"; Appendix, p. 10 (footno The latter meant only "marketing ability", as shown by the fact only about 30% of the qualified cooperatives operated any pla i.e,, had any "capacity" in the physical sense (21 out of 66 in 19 Vol. VII, Jt. App. 3147; and only about 8 of these operated sur disposal plants). See note 6, p. 10 above.

On the very face of the 1938 provision, qualification for paym did not require any plant operation. Only the highest *rate* of p ment was made to cooperatives operating plants; Sec. 927.76 Appendix, p. 11; and these qualified for payments on all milk ceived" at all their plants, *irrespective* of whether the milk was u as surplus milk or bottled for fluid consumption, and irrespectiv whether the plants were surplus manufacturing plants. Theref the 1938 payment was *unrelated* to surplus milk disposal, for m bers or non-members; see also note 6, p. 10 above.

Reference in the 1938 provision to "sufficient plant capacity" non-members deals merely with an *additional volume of milk* which payments could be made, and the volume of milk by w payments are measured is not at issue in this case.

the 1938 New York Order. This footnote does not state the kind of provision which this Court would sustain. It merely indicates that the Boston Order did not even include a provision related to surplus handling, and therefore did not require the Court to give any further consideration to the contention that surplus handling supported the challenged payments. Thus, the court below not only disregarded the three grounds on which this phase of the 1938 provision herein is indistinguishable from the Boston Order, but misapplied the fourth.

4. With respect to the 1953 Amendment, the court below misapplied Footnote 12 of the *Stark* case (Appendix, p. 37): "The requirements mentioned by the Court are essentially retained and even made more specific by the 1953 amendments to the Order. With reference to maintaining facilities for the disposal of surplus milk, a cooperative in order to qualify for the relevant payment [an additional one cent per cwt.] must operate marketing facilities, or have within its membership federated cooperatives operating marketing facilities, 'at which is received at least 25 per centum, by weight, of the milk marketed by all the *members* of the cooperative or by all the *members* of the federated cooperatives.'" (Emphasis ours.) This quotation from Sec. 927.76(e), Condition (6), of the 1953 Amendment is inapplicable. In the first place, only "operating facilities" are referred to therein, without any requirement that these be "facilities for the disposal of surplus milk" (and in fact, in most instances they are not such manufacturing facilities, but only plants for shipping raw fluid milk).[11] This omission from the 1953 Amendment is emphasized by the absence therefrom of any provision for payment by reason of any expense or financial burden in operating surplus dis-

[11] See note 10, p. 12 above.

posal facilities.[12] More significantly, this requirement th
the operating facilities receive "at least" 25% of the mi
of "members" is not a requirement to receive or be able
receive any non-member milk; nor is it a requirement to
ceive or be able to receive "all of the milk of * * * member
(1938 provision). Since the 1953 Amendment thus elim
nated the language of the 1938 provision cited in Foo
note 12 of *Stark*, the irrelevance of the substance of Foo
note 12 becomes even more apparent.

Finally, the court below found that the 1953 Amendme
"made no material change" in the 1938 provision referre
to in Footnote 12 of *Stark*, "with regard to the requir
ments imposed upon cooperatives to dispose of milk in su
a way that all producers will benefit." Sec. 927.76(g)(
(iii), Appendix, p. 24. However, as shown immediate
above, the 1953 Amendment, by containing no provision f
surplus disposal facilities, or for receiving all member mi
or for receiving any non-member milk, falls within t
clear language of the text in the *Stark* opinion (at 460-46
discussed above, p. 11) and the Boston Order. Th
renders the above clause of such limited scope that t
Secretary himself did not include it among the requir
ments for qualification, the six conditions in Sec. 927.76(e

It is submitted, therefore, that the decision below is
conflict with *Stark:* it is a decision which ignores the inte

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[12] The 6 "requirements" in Sec. 927.76(e) for payment under t
1953 Amendment deal entirely with order activities and education
activities, rather than compensation for the cost of operating su
plus disposal facilities. Condition (6) merely entitles cooperativ
(in fact, only one) operating any kind of plants to receive an add
tional one cent per cwt., based only on the finding that these "are
a more advantageous position than non-operating cooperatives f
discerning the need to change class prices" (Vol. I, Jt. App. 11
line 1). Thus, the additional one cent is not based on any financi
burden of surplus disposal plant operation; indeed, no finding w
ever made on the amount of any such burden, and the extra cent
also paid to federations which operate no plants whatever.

The Secretary here followed Conclusion No. 10 of his Offici
Committee of Experts (Vol. V Jt. App. 2216): "The Committ
concludes that cooperative payments should be related to the mai
tenance of surplus handling facilities *only* to the extent that su
activity enables the cooperatives to perform 'Order Activities an
Education' more effectively."

pretation of the Act made in *Stark*, and which rests instead on the views of the Secretary as to policies he believes desirable; and it is a decision which misapplies *Stark* in attempting to distinguish that case.

The court below has decided a federal question of statutory interpretation in a way which conflicts with applicable decisions of this Court, other than *Stark*. This Court has held that basic questions of statutory delegation of power must be resolved *before* reliance on findings of necessity made by an administrative agency. Agency findings of "necessity" did not control in *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 508 at Footnote 16, 509 (wherein it was deemed that natural gas is the very "lifeblood" of a pipeline system). See also *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, 600. In *Addison* v. *Holly Hill Co.*, 322 U. S. 607, the hearing record included 24 volumes and 36 pages of examiner's findings. In *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, the Commission relied on "two bulky volumes" (110 F. Supp. 374, 383) of evidence, in support of its conclusion that the regulation was within its "necessary" and "not inconsistent" powers (*id.*, at 383; and 347 U. S. at 289, note 7); but this Court held that such conclusion would not permit "stretching the statute" (at 294).

In sanctioning expansion of the Act by resort to the "auxiliary powers clause", the court below decided contrary not only to *Stark*, but also in conflict with *U. S.* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 575, which emphasizes the limited scope of the "auxiliary powers clause"[13] of this Act.

The above cases, as well as *Stark*, illustrate basic principles of statutory interpretation which the court below did not apply. In disregarding the clear language requiring

[13] See especially Footnote 16 in *Stark*, 342 U. S. at 465.

"uniform prices," and in disregarding the particulari
tion with which the Act authorizes orders containi
enumerated terms and "no others" and specifies the "onl
adjustments permitted to be made in such prices, t
court below decided in conflict with the many decisi
of this Court which require observance of such expressi
of Congressional intent.

**II. This case involves a substantial federal questi
of general importance.**

This case involves a substantial question of general i
portance under a statute of the United States, the Agri
tural Marketing Agreement Act of 1937. The decision
the court below pertains to construction of the basic p
vision of this Act, Sec. 8c(5), authorizing "unifo
prices" for milk, pursuant to which milk marketing ord
have now been promulgated by the Secretary of Agri
ture for 64 major milk markets throughout the nati
Cooperative associations function in each of these mark
Nothing in the decision of the court below precludes
application thereof to any similar provision for payme
to other cooperatives, if adopted in any of the other n
orders presently effective.[14] At the time of *Stark*, simi
payments were provided in four orders, including Bost
Cincinnati and Dayton (*Stark*, at 466, note 19). Therefo
the decision is of national significance and involves an
portant question with far-reaching effects on the admi
tration of the Act.

[14] In a Motion for Leave to File Brief *Amicus Curiae*, filed in
court below on behalf of respondents, a federation of cooperat
asserted (par. 3) that "many of its members are performing mar
wide services of various kinds in markets regulated by Federal
marketing orders, and others plan to perform such services in
future if the validity of payments to cooperatives for such servic
sustained in this case." The brief, p. 10, also states "the effec
the decision in this case is not local in character." The Secre
filed his consent to said motion.

The 64 federal milk orders, presently in effect, regulate about 30 billion pounds of milk produced annually by over 200,000 dairymen.[15] The New York order alone covered milk valued at $312,000,000 in 1954, produced by about 50,000 dairymen.[16] It is estimated that, in the 50 orders which presently prescribe Producer Settlement Funds, over a billion dollars of monies belonging to dairymen are committed every year to the Secretary's trusteeship[17] under the Act.

The deductions for cooperatives out of the Producer Settlement Fund under Order No. 27, only since this action was instituted, have amounted to over $5,700,000, of which about $2,550,000 is held in escrow awaiting disposition by this Court.

This case is the very first which sustains an unrecoverable charge[18] in the nature of a tax[19] against non-members, to finance certain private cooperative corporations out of the Producer Settlement Fund;[20] and such Funds are presently authorized in about 50 federal milk orders. By the decision below, the vast amounts of monies in all such Producer Settlement Funds are now vulnerable to these and other charges, for these and other payments. The Act contains no specific language expressly authorizing such charges or payments, and provides no standards by which to determine the nature or amount of such charges or pay-

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[15] At the end of 1954, 53 federal milk orders were effective, regulating over 27 billion pounds of milk produced by over 186,000 dairymen. *Report of Dairy Division*, Department of Agriculture, p. 22, presented at Hearings of the Dairy Sub-Committee, House of Representatives Committee on Agriculture, April 19, 1955.

[16] Market Administrator's 1954 Annual Report, pp. 17, 19.

[17] See *Stark* v. *Wickard*, 321 U. S. 288, at 305.

[18] *Id.*, at 301.

[19] *Id.*, at 303.

[20] See Sec. 927.70 of Order No. 27, Appendix, p. 9.

ments. Therefore, this case is precedent for future interpretation of said Act, with consequences so far-reaching in its administration and in the prices received by farmers for their milk, as to warrant that the issue be settled by the Supreme Court.

III. If the decision below is not controlled by *Brannan* v. *Stark* it decides an important question of federal law which has not been, but should be, settled by this Court.

If this case differs from *Stark* in respects sufficiently substantial that the decision of this Court therein does not control this case, it necessarily follows that such substantial differences warrant review by this Court. This is the first case in which an appellate court (the court below) has sustained invasion of the Producer Settlement Fund prescribed in federal milk orders, by the deduction of moneys from all producers, including non-members, for payments to cooperative associations for any purpose. Unless controlled by *Stark,* this is a case of first impression; and its national importance has been established above, pp. 16-17.

IV. The decision of the court below is erroneous.

Sec. 8c(5) of the Act authorizes milk orders containing the enumerated terms and, except as provided in Sec. 8c(7), "no others". Sec. 8c(5)(B) of the Act expressly provides "only" for specified adjustments in "uniform prices" paid to producers and associations of producers for specific purposes: in brief, for (a) volume, market and production differentials, (b) the grade or quality of milk

(c) the location of delivery, and (d) a further adjustment, to accommodate a base-marketing program.[21]

Thus, we are here concerned with a statute which expressly provides for specific adjustments (deductions or additions) in the price of milk arising out of such ordinary and necessary factors as differences in volume, quality and location; Sec. 8c(5)(A) and (B). The Congress enumerated the specific marketing services for which deductions are permitted to be made, "except as to producers for whom such services are being rendered by a cooperative", Sec. 8c(5)(E), and the challenged payments for different purposes are clearly inconsistent therewith. The Congress specified certain rights and privileges to be accorded to cooperative associations; Sec. 8c(5)(F) and Sec. 8c(12); and Congress specifically preserved the *customary* source of revenue of cooperatives by precluding the Secretary from issuing any order that could require cooperatives to distribute the price of milk other than "in accordance with the contract between the association and its producers"; Sec. 8c(5)(F). This Court in *Stark* rightly held that since Congress considered such provisions of sufficient importance to specify them with such particularity, this established "the likelihood of similar specific authorization for the contested deductions if Congress intended that they should be made"; and that the special payments to certain cooperatives are "inconsistent" with Sec. 8c(5)(A) and (B) of the Act.

The Secretary herein levies a tax or charge against petitioners and all other non-members of cooperatives, to compel them to support financially the customary activities of efficient cooperatives, carried on generally throughout the

[21] This further adjustment, although relied upon by the Secretary in *Stark* and throughout the proceeding below, has been held in both cases to be entirely inapplicable to both the Boston and New York regulations in contest; see Findings entered in *Stark* v. *Brannan*, 82 F. Supp. 614, and the decision of the District Court in the instant case, Vol. I Jt. App. 177.

United States at member expense in their own self interest, in all major milk markets, whether or not under regulation.[22] Petitioners, some of whom belong to other farm groups, do not wish to support these cooperatives,[23] whose interests are often adverse to their own. They were not liable at common law for the indirect benefits to them from cooperative association activity. In *Stark*, this Court correctly ruled that the novel and extraordinary power to create the new liability imposed below cannot be found in the "omnibus subsection" of Sec. 8c(7)(D).

In effect, the Secretary found, and the court below erroneously concurred, that since cooperatives incur expenses in the performance of certain activities which may also benefit non-members, the Act should be rewritten by administrative action to prescribe "uniform expenses" (as well as "uniform prices"); that otherwise "unfair" disparity (Appendix, p. 31) would result. This, of course, is merely a conclusion that the challenged payments are proper as a matter of equity, but this is not application of the controlling statutory provisions. As this Court held in *Stark*, "the equity or the wisdom of the payments to cooperatives" (466) is not involved. Courts are concerned with "what Congress did, not what it could do"; *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 355.

The lack of statutory authority herein is emphasized by the absence of any standards as a basis for the Secretary's discretion: his 1953 amendments, by reducing the cooperative beneficiaries from over 70 to 2, by extending the payments to "federations", and by creating a classification based on membership of 4,000 or more, demonstrate the vast dimensions of the field which is opened up under the Secretary's view of the Act. Congress did not intend

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[22] See note 8, p. 11 above.

[23] Since 1953, members of small cooperatives must also finance the two large ones, a distinction of size upon which the Act is, of course, silent. See note 7, p. 10 above. The Act is also silent with respect to the "federations" of cooperatives, paid by the 1953 Amendment.

to subject the billions of dollars of producer monies to diversion among different groups through agency action not controlled by any statutory standards. Findings are no substitute for statutory authority; and the 1938 provision lacks even these.

Irrespective of differences in language between the Boston and New York orders, and between the 1938 and 1953 provisions of the New York order, the fact remains that such deductions and payments are unauthorized invasions of the trust funds known as the Producer Settlement Funds. Of the two large New York cooperatives, which alone are now permitted to qualify, one was an *Amicus* below (on behalf of petitioners) which urged exactly this. If any cooperatives believe that their activities under milk orders result in inequity, as compared with non-members and (since 1953) with smaller cooperatives, their beliefs should be urged upon Congress.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statute Involved

The following are relevant sections of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. Sec. 608c *et seq.*, reenacting, amending and supplementing the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended by the Act of August 24, 1935, 49 Stat. 750:

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof * * *.

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such

other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of

the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the

price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk. * * *[1]

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[1] We omit from this printing Sec. 8c(6) of the Act, which relates *only* to certain fruits, nuts, tobacco, vegetables, soybeans and naval stores. One provision is paragraph (D), which authorizes terms for such orders: "(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof."

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions: * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order. * * *

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers. * * *

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof. * * *

MILK PRICES

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its

products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions

of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12). * * *

Sec. 10(b)(1) * * * The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution. * * *

1938 ORDER PROVISIONS

The following are relevant sections of Order No. 27, 7 C. F. R. § 927.61 *et seq.* as effective in 1938 (until 1953). The entire Order appears substantially in Vol. II Jt. App. 451. The 1938 provisions challenged are Sec. 927.61(b) and Sec. 927.76, included below.

Sec. 927.61 *Computation of the uniform price.* The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the report submitted for the preceding month by each handler. If the unreserved cash balance in the producer settlement fund to be included in the computation is less than two cents per hundredweight of milk received from producers on all reports, the report of any handler who has not made payment of the last monthly pool debit account rendered pur-

suant to Sec. 927.71 shall not be included in the computation of the uniform price. The report of such handler shall not be included in the computation for succeeding months until he has made full payment of outstanding monthly pool debits. Subject to the aforementioned conditions, the market administrator shall compute the uniform price in the following manner:

(a) Combine into one total the net pool obligations of all handlers;

(b) Subtract the total of payments required to be made for such month by Sec. 927.76;

(c) Add the total payments required to be made by handlers for such month pursuant to Sec. 927.78;

(d) Add the amount of unreserved cash in the producer settlement fund;

(e) Subtract an amount equal to not less than eight cents nor more than nine cents per hundredweight of milk received from producers to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers;

(f) Subtract the Class 1-C milk of all handlers whose reports are included in this computation from the total milk received from producers by all such handlers; and

(g) Divide the result obtained in paragraph (e) of this section by the result obtained in paragraph (f) of this section. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants in 201-210 mile zone.

Sec. 927.62 *Announcement of uniform price and weighted average butterfat differential.* The market administrator shall announce not later than the 14th day of each month, the uniform price computed pur-

suant to Sec. 927.61 and not later than the 5th day of each month the weighted average butterfat differential pursuant to Sec. 927.67.

Sec. 927.70 *Producer settlement fund.* The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to Secs. 927.72 through 927.78.

Sec. 927.71 *Handlers' accounts.* The market administrator shall establish an account for each handler who is required to make payments to the producer settlement fund or who received payments from the producer settlement fund. After computing the uniform price and each handler's pool debit or credit each month, and at such times as he deems appropriate, the market administrator shall render each handler a statement of his account showing the debit or credit balance, together with all debits or credits entered on such handler's account since the previous statement was rendered.

Sec. 927.72 *Payment to the producer settlement fund.* On or before the 18th day of each month each handler shall make full payment of the debit balance, if any, of such handler shown on the last statement of account rendered pursuant to Sec. 927.71.

Sec. 927.73 *Payments out of producer settlement fund.* On or before the 20th day of each month the market administrator shall make payment to each handler of the credit balance, if any, of such handler shown on the last statement of account rendered pursuant to Sec. 927.71. If, at any such time, the balance in the producer settlement fund is insufficient to make full payment due to each handler, the market administrator shall reduce uniformly the payments to each handler and shall complete such payments as soon

as the necessary funds are available. No handler wh on the 25th day of the month, has not received suc payments in full from the market administrator sha be deemed to be in violation of Secs. 927.65 throug 927.67 if he reduces his total payments to producer for milk delivered by such producers during the pr ceding month by not more than the amount of the r duction in payment from the producer settlement fun

[1] Sec. 927.76 *Cooperative payments.* Any cooper tive association of producers may apply to the Secr tary for a determination of its qualifications to receiv payments pursuant to this section by reason of i having and exercising full authority in the sale the milk of its members; arranging for and supplyin in a manner commensurate with the marketing capa ity of the several types of cooperative associatio designated in this section, in times of short supp Class I milk to the marketing area; securing util zation of milk, in times of long supply, in a manne to assure the greatest possible return to all producer having its entire activities under the control of i members; and complying with all provisions of th subpart applicable to it.

After the Secretary has determined any cooperati to be qualified to receive payments pursuant to th section, such cooperative shall, from time to time, requested by the market administrator, make repor to the market administrator with respect to servic rendered to the market and the use of the sums r ceived under this section. Whenever the market a

[1] This section, one of the challenged provisions, was in effect wit out substantial change from Sep. 1, 1938 to Dec. 16, 1953. A amendment to Order No. 27 effective July 1, 1941, adopted t language "arranging for and supplying, in a manner commensura with the marketing capacity of the several types of cooperati associations designated in this paragraph" in lieu of "using its b efforts to supply."

ministrator has reason to believe that any cooperative qualified by the Secretary is failing to perform the obligations covered by the payments under this section, he shall suspend and hold in reserve such payments, notifying the Secretary and the cooperative of his action and the reasons therefor. Such suspended payments shall be held in reserve until the Secretary has, after hearing, ruled upon the performance of the cooperative and either ordered the suspended payments to be paid to the cooperative in whole or in part or disqualified the cooperative, in which event the balance of payments held in reserve shall be returned to the producer settlement fund.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

(a) Three-quarters of one cent per hundredweight of milk received from producers at any handler's plant which was caused to be delivered from its members by such associations and on which such handler has made the reports and payments required by this order;

(b) Except as set forth in paragraph (c) of this section, two cents per hundredweight of milk received from producers at plants of other complying handlers which was reported and collected for by such association; and

(c) Four cents per hundredweight of milk received from producers at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the

Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, four cents per hundredweight of milk received from producers which was caused by it to be delivered to any other complying handler and which is reported and collected for by such association.

1953 AMENDMENT TO ORDER

The following are findings and amendment adopted with respect to Sec. 927.76 of Order No. 27 effective December 16, 1953. This 1953 amendment expressly deleted Sec. 927.76 of the Order as effective prior thereto. The complete Secretary's Decision effective December 16, 1953, is set forth in Vol. I, Jt. App. 107-132.

Sec. 927.0 *Findings and determinations.* The findings and determinations hereinafter set forth are supplementary to and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid order and of each of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings upon the basis of the hearing record.* Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*), and the applicable rules of practice and procedure, as amended, governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order, as amended, regulating the handling of milk in the New York metropolitan

milk marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and the order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act.

(2) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of Sec. 8c of the Act (7 U. S. C. Secs. 608c(5)-(7)) and necessary to effectuate the other provisions of the order.

(3) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are necessary in order equitably to apportion the total value of the milk purchased by all handlers among producers and associations of producers, on the basis of their marketings of milk during each month which is the proper representative period.

(4) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are necessary to accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in the relevant Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(5) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply of and demand for milk in

the marketing area, and the minimum prices specified in the marketing agreement and in the order, as amended, and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

(6) The marketing agreement and the order, as amended, and as hereby further amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which a hearing has been held.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the handling of milk in the New York metropolitan milk marketing area shall be in conformity to and in compliance with the terms and conditions of the aforesaid order, as amended, and as hereby further amended; and the aforesaid order, as amended, is hereby further amended as follows:

Delete Sec. 927.76 of the order as now in effect and substitute therefor the following:

Sec. 927.76 *Cooperative payments for market-wide services.* Payments shall be made to qualified cooperatives or to federations under the conditions, in the manner, and at the rates set forth in this section.

(a) *Definitions.* As used in this section the following terms shall have the following meanings:

(1) "Cooperative" means a cooperaive association of producers which is duly incorporated under the cooperative corporation laws of a state; is qualified under the Capper-Volstead Act (7 U. S. C. 291 *et seq.*); has all its activities under the control of its members and has full authority in the sale of its members' milk.

(2) "Federation" means a federation of cooperatives.

(3) "Federated cooperative" means a cooperative which is a member of a federation and on whose membership the federation is an applicant for or receives payments under subparagraph (2) of paragraph (f) of this section.

(4) "Member" means, when used with respect to a member of a cooperative or of a federated cooperative, only a member who is also a producer, as defined in Sec. 927.6.

(b) *Qualified cooperatives and federations.* A cooperative or federation may submit an application to the Market Administrator for payments under the provisions of this section. In accordance with the requirements of the rules and regulations issued by the Market Administrator, any such application shall include a written description of the applicant's program for the performance of market-wide services, including evidence that adequate facilities and personnel will be maintained by it so as to enable it to perform the market-wide services; and the application shall contain a statement by the applicant that it will perform the required market-wide services for which it is applying for payments. The application shall set forth all necessary data so as to enable the Market Administrator to determine whether it meets the qualification requirements with respect to the payments for which the application is submitted. An application shall be approved by the Market Administrator only if he determines that:

(1) In the case of a cooperative:

(i) It has not less than 4,000 members and receives from its members not less than 1 cent

per hundredweight of milk delivered by them: *Provided,* That no person shall be counted in this respect as a member if he is a member of another cooperative which is an applicant for or which receives cooperative payments, or if he is a member of a federated cooperative.

(ii) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, it has not less than 6,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them, subject to the proviso of subdivision (i) of this subparagraph.

(iii) If the application is also for an additional payment under subparagraph (4) of paragraph (f) of this section, the cooperative is an operating coperative which operates marketing facilities, *i.e.,* pool plants(s), at which it receives at least 25 per centum, by weight, of the milk marketed by its members; *Provided,* That in determining whether the 25 per centum minimum requirement is complied with, there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(2) In the case of a federation:

(i) It is duly incorporated under the laws of a state.

(ii) It has contracts with each of its federated cooperatives under which the cooperatives agree

to remain in the federation for at least one year, and such contracts cover or will be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes.

(iii) Its federated cooperatives have an aggregate of not less than 4,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by them; and its federated cooperatives will pay to the federation, when required by rules and regulations issued by the market administrator, the minimum monthly payment specified in the rules and regulations to finance the activities of the federation that are not market-wide in character: *Provided,* That no person shall be counted in this respect as a member if he is a member of a cooperative which is an applicant for or which receives cooperative payments, or if he is a member of another federated cooperative.

(iv) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, the aggregate membership of the federated cooperatives is not less than 6,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by their members, subject to the proviso in subdivision (iii) of this subparagraph.

(v) If the application is also for an additional payment under subparagraph (5) of paragraph (f) of this section, the federation operates marketing facilities, *i.e.*, pool plants(s), or the federated cooperatives operate marketing facili-

ties, at which is received at least 25 percentum, by weight, of the milk marketed by the members of the federated cooperatives: *Provided,* That in determining whether the 25 percentum minimum requirement is complied with, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) The applicant cooperative or federation demonstrates that it has the ability to perform the market-wide services for which application is made, and that such services will be performed.

(4) The applicant cooperative or the federated cooperatives of an applicant federation are in no way precluded from arranging for the utilization of milk under their respective control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(c) *Notice of qualification or denial: Effective date.* Upon determination by the market administrator that a cooperative or a federation is qualified to receive payment for performance of the market-wide services, he shall transmit such determination to the applicant cooperative or federation and publicly announce the issuance of the determination. The determination shall be effective with respect to milk delivered on and after the first day of the month following issuance of the determination. If after consideration of an application for payment

for market-wide services, the market administrator determines that the cooperative or federation is not qualified to receive such payments, he shall promptly notify the applicant and specifically set forth in such notice his reasons for denial of the application.

(d) *Requirements for continued qualification.* From time to time and in accordance with rules and regulations which may be issued by the market administrator, each qualified cooperative or federation must demonstrate to the market administrator that it continues to meet the qualification requirements for the payments and is fully performing the market-wide services for which it is being paid.

(e) *Market-wide services.* Each cooperative or federation shall perform the market-wide services enumerated in this paragraph. Such services are: (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs

for submission thereafter; (5) conducting a comprehensive educational program among producers—*i.e.*, members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend; and (6) in the case of a cooperative or federation which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of this section, operating marketing facilities, or having within its membership federated cooperatives operating marketing facilities, *i.e.*, a pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives' members.

(f) *Rate, computation, time, and method of payment.*

(1) Subject to the provisions of paragraph (g) of this section, the market administrator, on or before the 25th day of each month, shall make payment out of the producer-settlement fund, or issue equivalent credit therefor, to each cooperative or federation which is qualified for such payments for market-wide services. The payment to a cooperative shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from its members, and the payment to a federation shall be based upon the milk reported by cooperative or proprietary handlers to have been

received during the preceding month from the members of its federated cooperatives, subject in both instances to adjustment upon verification by the market administrator.

(2) Such payment or credit shall be at the rate of 2 cents per hundredweight of milk in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing payment to a cooperative, there shall be excluded all of the milk of its members who belong to another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk; and *Provided further,* That in computing payment to a federation there shall be excluded all of the milk of members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) Any cooperative that has at least 6,000 members and any federation which has an aggregate membership of its federated cooperatives of at least 6,000 members shall receive a payment, in addition to the payment provided for in subparagraph (2) of this paragraph, of 1¢ per hundredweight of milk in accordance with subparagraph (1) of this paragraph and subject to the provisos contained in subparagraph (2) of this paragraph.

(4) Any cooperative that operates marketing facilities, i.e., a pool plant(s), at which is received at least 25 per centum, by weight, of the milk

marketed by its members shall receive a payment in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph of 1 cent per hundredweight of all milk marketed by its members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(5) Any federation that operates marketing facilities, i.e., a pool plant(s), or whose members include one or more federated cooperatives that operate marketing facilities, at which is received at least 25 per centum, by weight, of the milk marketed by the members of its federated cooperatives shall receive a payment in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by such members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(6) If an individually qualified cooperative is affiliated with a federation, the cooperative pay-

ment shall be made to such cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments.

(g) *Disqualification.*

(1) The market administrator shall issue an order wholly or partly disqualifying a previously qualified cooperative or federation for payments authorized pursuant to this section and such payments shall not thereafter be made to it if he determines that:

(i) The cooperative or federation no longer complies with the requirements of this section: *Provided,* That in the case of the federation, if one of its federated cooperatives has failed to comply with the requirements of this section applicable to it or has failed, promptly after demand by the market administrator to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification, the federation shall be disqualified only to the extent that its qualification for payments or the amounts of its payments are based upon the membership, milk or operations of such non-complying federated cooperative.

(ii) The cooperative or federation has failed to make reports or furnish records pursuant to this section or pursuant to rules and regulations issued by the market administrator.

(iii) In the case of the cooperative, it has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification; or

(2) An order of the market administrator wholly or partly disqualifying a cooperative or federation shall not be issued until after the cooperative or federation has had opportunity for hearing thereon following not less than 15 days' notice to it specifying the reasons for the proposed disqualification. If the cooperative or federation fails to file a written request for hearing with the market administrator within such period of 15 days, the market administrator may issue an order of disqualification without further notice; but if within such period a request for hearing is filed, the market administrator shall promptly proceed to hold such hearing pursuant to rules and regulations issued by him under paragraph (i) of this section.

(3) A disqualification order issued by the market administrator shall set forth the findings and conclusions on the basis of which it is issued.

(h) *Appeals.* * * *

(i) *Regulations.* The market administrator is authorized to issue regulations and amendments thereto to effectuate the provisions of this section and to facilitate and implement the administration of its provisions, such regulations shall be issued in accordance with the following procedure: * * *

(j) *Reports and records.* A qualified cooperative or federation and any federated cooperative in a

qualified federation shall make such reports to the market administrator as may be requested by him for the administration of the provisions of this section, and shall maintain and make available to the market administrator or his representative such records as will enable the market administrator to verify such reports.

(k) *Notices, demands, orders, etc.* All notices, demands, orders or other papers required by this section to be given to or served upon a cooperative or federation shall be deemed to have been given or served as of the time when mailed to the last known secretary of the cooperative or federation at his last known address.

(l) *Adjustment period.* Any cooperative which was qualified, on the effective date of this section, to receive payments pursuant to the provisions of Sec. 927.76 as effective December 31, 1952 (referred to in this paragraph as the "former provisions") shall continue to receive payments pursuant to and subject to the conditions specified in such former provisions on milk received from producers during the 90-day period immediately following the effective date of this section; and if such cooperative has applied, or is a federated cooperative of a federation which has applied, for qualification pursuant to this section prior to the expiration of such 90-day period, it shall continue to receive payments pursuant to the former provisions beyond such 90-day period until such time as the market administrator has ruled upon such application: *Provided,* That a cooperative or a federation may be qualified to receive payments pursuant to this section within such 90-day period; and *Provided Further,* That in no event shall a cooperative, or a federated cooperative in a federa-

tion, receive payment under the former provisions for any period following the effective date of qualification of the cooperative or federation under this section. For the purposes and to the extent specified in this paragraph, the provisions of Sec. 927.76 as effective December 31, 1952, shall remain in force and effect after the effective date of this section.

Opinion of United States Court of Appeals For the District of Columbia Circuit

Decided December 8, 1955

Before PRETTYMAN, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* The appeals involve the validity of payments authorized by certain parts of an Order regulating the marketing of milk in the New York Metropolitan Milk Marketing Area. The District Court sustained the payments as valid. The Order which provides for them, known as Order No. 27, 7 C.F.R. §§ 927.1 *et seq.* (1952), as amended, 7 C.F.R. §§ 927.1 *et seq.* (Supp. 1955), was issued originally by the Secretary of Agriculture in 1938, effective upon the issuance of a like order by the Commissioner of Agriculture and Markets of the State of New York, as part of a joint federal-state program. See 3 Fed. Reg. 1945-1951 (1938). The Secretary acted upon the purported authority of the Agricultural Marketing Agreement Act of 1937, c. 296, 50 Stat. 246, as amended, 7 U.S.C. §§ 601-700 (1952). The suit arose on complaint of six dairy farmers whose marketing of milk is regulated by the Order. They sought to enjoin the

Secretary[1] from making payments under section 927.76 of the Order to cooperative associations of milk producers or federations of such associations. The plaintiffs attacked this provision as unauthorized by the federal statute. After hearing and upon the basis of findings of fact and conclusions of law the District Court held for the Secretary and other defendants and entered judgment dismissing the complaint. The appeal in No. 12478 is from this judgment. *Pendente lite* the District Court issued a preliminary injunction requiring the Secretary and the Market Administrator to withhold and place in escrow portions of the payments in question. Upon dismissing the complaint the court vacated this injunction but stayed its action pending the appeal of plaintiffs in No. 12478. In No. 12498 the Secretary appeals from this stay order. The escrow fund has accumulated in the amount of over $1,500,000.

The Order is one of a number covering milk marketing areas in various parts of the United States. *Stark* v. *Wickard,* 321 U.S. 288, which also arose in this jurisdiction,[2] contains a general description of the purposes and nature of such orders. They set forth programs that are designed "to stabilize the price of milk, in aid of both producers and distributors or handlers, and to maintain orderly marketing conditions." *United Milk Producers of New Jersey* v. *Benson,* —— U. S. App. D. C. ——, ——, 225 F. 2d 527, 529. As we there also said,

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[1] We refer only to the Secretary in the text of the opinion. Reference to other appellees, who are officials concerned with the administration of the Order, is omitted for purposes of simplicity. The Commissioner of Agriculture and Markets of the State of New York and certain cooperative associations and federations of such associations were permitted to intervene in the District Court and are appellees in No. 12478 and appellants in No. 12498.

[2] See 78 U. S. App. D. C. 44, 136 F. 2d 786.

> "* * * The validity of the statute and of particular marketing orders made under its terms has been upheld in opinions which elaborate the legal and economic aspects of the program. United States v. Rock Royal Co-op, 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446; H. P. Hood & Sons v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478."

A general description of Order No. 27 is perhaps desirable before turning to its particular provisions under attack. The Order has many features in common with others which have been before the courts. The purpose of the Order as described in the Secretary's brief, not controverted in this respect, is to establish uniform minimum prices to be paid by handlers and uniform prices to be paid to producers. The first aim is achieved by setting uniform minimum prices for each milk use classification, such as fluid milk, cream, and various manufactured milk products. Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handlers who purchase it. Several steps are involved in reaching this uniform price. The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions, including a deduction for payments to cooperatives for marketwide services, the payments here under attack. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, *i.e.*, a calendar month, is

greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

The payments to cooperative associations[3] of producers sought to be enjoined are specified in section 927.76 of the Order.[4] The payments are subject to elaborate qualifications the cooperatives must meet with respect to services and reporting. To understand better the place of the cooperatives in the total scheme, some of the findings of the Secretary, made after extensive administrative hearings, are now outlined. See 18 Fed. Reg. 6458-6465 (1953). The Secretary found that the milk supply for the New York Metropolitan Milk Marketing Area is produced by approximately 50,000 dairy farmers scattered over six states in a milkshed which extends more than 400 miles from the marketing area. The value of the milk whose price has been regulated in this area has in recent years exceeded $300,000,000 annually. The volume of milk was approximately seven billion pounds in the year 1952. Price fixing under this huge program is not static; it requires constant attention. Problems in the vast milkshed empha-

[3] We use interchangeably the expressions "cooperatives," "cooperative associations" and "federations of cooperative associations," for, though they may differ in composition, the differences are not material for purposes of this case.

[4] This section of the Order went through amendment during the course of the litigation. The complaint was filed in March, 1952, at which time § 927.76 was in the text originally adopted. See 7 C.F.R. § 927.76 (1952). It was altered by amendment effective December 16, 1953, see 7 C.F.R. § 927.76 (Supp. 1955), after which the complaint was also amended to cover the changed situation.

size the need for active participation in the program by producers. Producer groups must be prepared day by day to submit detailed data as to the market situation, so that the total milk supply will be properly utilized and the greatest return will be brought to all producers under the marketwide pool. The interests of proprietary handlers, a small group, are well represented. In the absence of informed participation by producers they would be at a disadvantage, a result which would be inconsistent with the statutory scheme and with the public interest. But the 50,000 individual producers are not generally able to attend the numerous hearings which it is necessary to hold from time to time on proposed amendments to the Order. The individual dairy farmer, moreover, does not have available the technicians and data necessary to effective representation of his interests at these meetings. He cannot with his limited means maintain the staff necessary to initiate requests for amendments and keep informed as to current market conditions and other changing circumstances in the highly complex field of milk marketing. Therefore active participation by producers under this program is feasible, as was here expressly found, only by means of cooperative associations of producers. Such cooperatives are required to perform the aforementioned marketwide services in order to qualify for the contested payments. In addition, they may be required to channel their milk into those utilizations that are most advantageous to the marketwide pool, thereby enhancing the value of the pool to the advantage of all producers in the milkshed. Finally, some cooperatives maintain manufacturing plants necessary to insure an outlet for the surplus milk which presents a recurring problem in the highly seasonal milk market. Thus it must be concluded that the cooperatives as a group advance the interests of producers generally throughout the milkshed. To the extent that producers' interests in the classification, pricing and pooling provisions of the Order may differ, such multiple interests are

represented by the cooperatives, for they are distributed throughout the milkshed and are of various types and sizes. Without the payments to cooperatives the cost of marketwide services rendered by them must be borne exclusively by their members, engendering an unfair disparity between members and nonmembers. All producers receive the value of the marketwide services and should pay for them on the same pro rata basis without regard to whether or not they happen to be members of the cooperative associations which perform the services. The cooperatives are under the constant scrutiny of the Market Administrator, and upon failure to perform the specified services the payments are discontinued. The cooperatives incur expenses in the performance of marketwide services at least equal to the amounts received as payments from the equalization or producer-settlement fund. Approximately 70 per cent of the producers are members of cooperative associations, and the value of the marketwide services is worth more to each producer than the small sum paid to the cooperatives.[5]

These findings of the Secretary, we repeat, were based on evidence taken at extensive hearings. At these hearings analyses of many experts were received. The record of the hearings, with the findings and conclusions of the Secretary, was before the District Court. The court found that the findings and conclusions of the Secretary were based on and supported by substantial evidence in the record of the hearings, which was certified by the Secretary to the court for review and was received in evidence as the hearing record upon the basis of which the court was to render its decision. *Cf. National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227. On the whole record the court held that the challenged provisions are authorized by the statute.

[5] The average annual expenditure per producer for the payments is approximately $25.00, while a change of only 1% in the uniform price affects the annual income of a producer by more than $60.00.

Appellants in their main brief in this court do not challenge as unsupported by the evidence the findings of fact of the Secretary or of the court. In their reply brief they do seem to question the correctness of some of the Secretary's findings, but we understand their contention actually to be that the findings are immaterial and not a substitute for the alleged lack of statutory authority. In other words, their position is that the payments, and the provisions of the Order authorizing them, are unauthorized by the statute. In any event, we accept the findings of fact of the court below, and therefore of the Secretary, as supported by substantial evidence in light of the record as a whole. This leaves for consideration the question of statutory authority upon which appellants rest their case.

Section 8c(5) of the Act[6] provides that in the case of milk and its products,

> "* * * orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay * * * for milk purchased from producers, or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk * * * is made to such handlers.
>
> "(B) Providing:
>
> "(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them * * *."

[6] 49 Stat. 754-755, as amended and re-enacted, 7 U.S.C. § 608c(5) (1952).

Subsection (7) of section 8c provides that orders shall contain "one or more of the following terms and conditions," followed by an enumeration including subsection (D) of subsection (7), which reads as follows:

> "(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

We agree with the District Court that these provisions of the statute support the challenged terms of the Order. Those terms as we have seen authorize payments to cooperative associations or federations thereof for marketwide services performed by them for the benefit of all producers, which includes the appellants. As we have also seen the Secretary under the statutory provisions is authorized to devise a "method" for fixing minimum prices for each use classification of milk, and all handlers must pay those prices for milk purchased from producers or associations of producers. The statute also directs, on the other hand, that the prices to be received by the producers are to be uniform, irrespective of the use made of the milk by the individual handler purchasing it. The orders made under the statute may contain terms incidental to and not inconsistent with the foregoing provisions, and necessary to effectuate them. It is incidental to, not inconsistent with, and necessary to effectuate both the method for setting class prices and the provisions for establishing a uniform price, that the Order provide for payments to cooperatives for services which are beneficial to all producers and reasonably necessary to the successful operation of the complicated program. Uniformity in the price received by producers is not destroyed by such payments. On the contrary, the findings are that the services for which they are made are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost. Fur-

ther, it is found that the cooperatives incur expenses in the performance of these marketwide services at least equal to the amount received from the fund. If the payments were for services beneficial only to members of the associations the case would be different. But they are for the benefit of nonmembers as well, and they are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted.

Appellants contend, nevertheless, that the decision of the Supreme Court in *Brannan* v. *Stark*, 342 U.S. 451, requires disapproval of the payments. We think this contention rests upon a misreading of that decision in its relation to the present Order. There the Supreme Court disapproved payments to cooperatives authorized by an Order for the Boston area.[7] That Order was issued under the same statute as was the Order in this case. While there is some language in *Stark* which might seem opposed to our decision, the facts there were so critically different from those in this case that such language must be deemed inapplicable. In the first place, most of the qualifying conditions imposed upon cooperatives by the Boston Order showed on their face that the services to be performed by the cooperatives were designed to aid only their members.[8] With reference to these conditions

[7] For an earlier history of the case, on the question of standing, see *Stark* v. *Wickard*, *supra*, and, in this court, *Brannan* v. *Stark*, 87 U. S. App. D. C. 388, 185 F. 2d 871.

[8] The Court, quoting 7 C.F.R. § 904.10(a) (Supp. 1947), listed these conditions as follows:

"'(1) It conforms to the requirements relating to character of organizaton, voting, dividend payments, and dealing in products of

the Court said, "But none of these shows any indication that the activity it prescribes will benefit nonmembers, with the possible exception of the seventh * * *." 342 U. S. at 459. The Court then disposed of the seventh requirement by stating that even if it comprehended a service to nonmember producers substantial enough to be significant in determining the validity of the mandatory contribution from them to cooperatives, "it does not support the exaction in issue, which concededly is based mainly upon other services primarily performed for members." 342 U.S. at 460. In this case, however, the marketwide nature and effect of the services to be performed by the cooperatives appear plainly from the text of the Order, and it is these services upon which the Secretary relies to justify the payments. Thus, for example, one of the requirements is "conducting a comprehensive educational program among producers—i.e., members and nonmembers of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing

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nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

" '(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

" '(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

" '(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

" '(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

" '(6) It constantly maintains close working relationships with its members.

" '(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

" '(8) It is in compliance with all applicable provisions of this subpart." 342 U. S. at 459 n. 9.

publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to nonmembers who request it, and holding meetings at which members and nonmembers may attend; * * *." 7 C.F.R. § 927.76(e) (Supp. 1955).[9]

In the second place, the Supreme Court did not have before it in the *Stark* case detailed findings of the Secretary and the District Court to the effect that the services performed by cooperatives are marketwide and are of great benefit to nonmembers as well as members. The record in this case, however, includes such findings, and they are well supported by the evidence. Hence we cannot conclude, as did the Court in *Stark*, that the activities required of cooperatives are only of incidental benefit to nonmembers.

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[9] The other qualifications are: "(1) Analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter; * * * (6) in the case of a cooperative or federation which receives an additional payment under paragraph (f)(4) or (5) of this section, operating marketing facilities, i.e., pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives." 7 C. F. R. § 927.76(e) (Supp. 1955). Note should also be taken of the bases for disqualifying a cooperative, 7 C. F. R. § 927.76(g) (Supp. 1955), one of which is discussed in the text *infra*.

Finally, particular note must be taken of the difference between the Boston Order and the New York Order regarding the services to be performed by cooperatives in securing outlets for surplus milk and in disposing of milk so as to bring the highest net return to the fund. The significance of the difference is enhanced by the fact that the Court in *Stark* explicitly contrasted the Boston Order with the New York Order in this respect, pointing out that the latter expressly requires that an association to qualify for the payments "must arrange for and supply 'in times of short supply, Class I milk to the marketing area,' and must secure 'utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers.' 7 CFR, 1950 Cum. Supp., § 927.9(f)." 342 U.S. at 461 n. 12. Moreover, the Court noted that under certain circumstances the New York Order also requires cooperatives to be " 'determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members.' *Id.*, at § 927.9(f)(3)." *Ibid.* The Court stated that presumably the omission of such provisions from the Boston Order was deliberate, and added, "In fact, the Secretary admits that many of the cooperatives in the Boston area were unwilling or unable to perform services such as those required by the New York Order." *Ibid.* The requirements mentioned by the Court are essentially retained and even made more specific by the 1953 amendments to the Order. With reference to maintaining facilities for the disposal of surplus milk, a cooperative in order to qualify for the relevant payment must operate marketing facilities, or have within its membership federated cooperatives operating marketing facilities, "at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives." 7 C.F.R. § 927.76(e) (Supp. 1955). The Secretary found that the cooperatives which maintain

standby facilities to allow producers to dispose of surplu milk refused by proprietary handlers do so at a greate financial burden than proprietary handlers who operat similar plants. He also found that such financial burde is a major handicap to some cooperatives, and that th nature of this marketwide service warrants payment t the cooperatives. With regard to the requirements im posed upon cooperatives to dispose of milk in such way that all producers will benefit, the 1953 amendment made no material change. The Order now provides tha a cooperative shall be disqualified if it "has failed promptly after demand by the market administrator, t arrange for the utilization of milk under its control s as to yield the highest available net return to all pro ducers without displacing an equivalent quantity of othe producer milk in the preferred classification * * *." C.F.R. §§ 927.76(g)(1)(i), 927.76(g)(1)(iii) (Supp. 1955) The Secretary found that the cooperatives perform marketwide service in acting so as to assure the mos desirable class utilization of milk, and the statements mad by the Supreme Court in the *Stark* case indicate it woul concur in that view. Confronted with these findings o the Secretary and the words of the Supreme Court re garding services performed by cooperatives under th New York Order in helping to solve the problems o surplus milk disposal and proper channeling of milk i the market, it is our view that the *Stark* decision is no hostile to the conclusion we reach and that, indeed, th opinion in some respects supports it.

The stay is vacated and in othe respects the judgment is affirmed

PRETTYMAN, *Circuit Judge,* dissenting: I am unable t distinguish *Brannan* v. *Stark* as my brethren do. Despit what they point out, it seems to me clear that the Suprem Court held the same conditions present in our case, o certainly very similar conditions, not to justify deduction

for payments to the cooperatives. I do not overlook the contrast noted by the Court between the New York and the Boston orders, but that notation seems to me not to affect the gist of the Court's opinion. Were it not for my inability to distinguish that case, I would agree entirely with the excellent analysis and disposition of the problem which appear in the present opinion of this court.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1955

Before: PRETTYMAN, FAHY and DANAHER, *Circuit Judges.*

These appeals came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that that portion of the judgment of the District Court staying pending appeal the provisions of paragraph 3 of the judgment entered September 24, 1954 in Civil Action No. 1081-52 be, and it is hereby, vacated, and that the said judgment of September 24, 1954, in all other respects be, and it is hereby, affirmed.

IT IS FURTHER ORDERED by the Court that the defendants in said Civil Action No. 1081-52, except the officers of the United States, recover against plaintiffs their taxable costs on these appeals and have execution therefor.

Dated: December 8, 1955.

PER CIRCUIT JUDGE FAHY.

Separate dissenting opinion by Circuit Judge Prettyman.

Order.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1956

Before: PRETTYMAN, FAHY AND DANAHER,
Circuit Judges, in Chambers.

Upon consideration of the motion of appellants in case No. 12,478, appellees in case No. 12,498, to stay transmission of certified copies of the judgment and opinion of this Court to the District Court on the ground that it is the intention of said parties to make an application to the Supreme Court of the United States for a writ of certiorari, and to continue in effect the partial stay granted by the District Court, and of the answers to said motion, it is

ORDERED by the Court that the transmission of certified copies of the opinion and judgment of this Court be, and it is hereby, stayed to and including February 6, 1956.

IT IS FURTHER ORDERED by the Court that the partial stay order of the District Court, as modified by the orders of this Court entered January 24, 1955, be, and it is hereby, continued in effect until issuance of certified copies of the opinion and judgment of this Court to the District Court, or, if application is made to the Supreme Court of the United States for a writ of certiorari, until final disposition of these cases by the Supreme Court of the United States.

Per curiam.

Dated: January 10, 1956.

Order.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1956

Before: PRETTYMAN, FAHY AND DANAHER,
Circuit Judges, in Chambers.

Upon consideration of the motion of the appellants in case No. 12,478, appellees in case No. 12,498, to stay issuance of the opinion and certified copy of the judgment of this Court, and of the answers to said motion, it is

ORDERED by the Court that issuance of the opinion and certified copy of judgment of this Court be, and it is hereby, stayed to and including February 16, 1956. No further stay of issuance of opinion and certified copy of the judgment will be granted.

Per curiam.

Dated: February 2, 1956.